



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Madison Services, Inc.

File: B-277614

Date: November 3, 1997

Christopher Solop, Esq., and Lynn Hawkins Patton, Esq., Ott & Purdy, for the protester.

Gregory H. Petkoff, Esq., Capt. Steven J. Dunn, and Lt. Col. Gerald M. Lawler, Department of the Air Force, for the agency.

Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that Air Force personnel, acting in bad faith, improperly "gamed" a cost comparison conducted pursuant to Office of Management and Budget Circular No. A-76, and that agency's review procedure was biased is denied where protest allegations are not supported by the record, which shows that agency personnel simply made a mistake in preparing agency's in-house cost estimate and that the mistake was corrected during agency's review process.
 2. Protest challenging agency decision to retain base operating services in-house, rather than contracting for the services, is denied where agency's decision was reasonably based on the results of a cost comparison conducted pursuant to Office of Management and Budget Circular No. A-76, and the protester has not shown that the cost comparison was faulty or misleading.
 3. The General Accounting Office will not review allegations that certain aspects of the contracting agency's cost comparison were incorrect where the protester did not raise the issues in its agency-level cost comparison appeals.
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DECISION

Madison Services, Inc. protests the Air Force's decision to retain in-house performance of base operating services at Columbus Air Force Base, Mississippi. The decision, made in accordance with Office of Management and Budget (OMB) Circular No. A-76 procedures, was based on a comparison of Madison's offer submitted in response to request for proposals (RFP) No. F41689-95-R-0025 with the Air Force's in-house cost estimate. Madison contends that the cost comparison was flawed for various reasons discussed below.

We deny the protest.

Issued on January 8, 1996, as a total small business set-aside, the RFP solicited offers for performing base operating services at Columbus Air Force Base for a basic contract period of 1 year with options for 3 additional years. The RFP divided the base operating services into three functional areas--civil engineering, transportation, and supply (of which only the civil engineering and transportation functions are at issue in this protest). The civil engineering function included responsibility for operations, military family housing maintenance, and lodging and linen exchange. The transportation function included traffic management and vehicle operations and maintenance. The RFP invited commercial offerors to submit technical and price proposals for any one or all of the functional areas.

The RFP stated that commercial offers would be evaluated on technical factors and price to determine which offers, or combination of offers, were most advantageous to the government. The RFP stated that an A-76 cost comparison, comparing the prices of the most advantageous commercial offers with the government's estimate of the cost of in-house performance, would then be conducted to determine whether it was more efficient to have the services performed by commercial entities or to continue to have the services performed in-house. If a decision was made to contract out, the RFP generally contemplated award of an indefinite quantity, fixed price contract for the engineering portion of the requirement,¹ and indefinite quantity, fixed-price with award fee contracts for the supply and transportation portion of the requirement.

Six offerors submitted several proposals for one or more functional areas (four proposals were submitted for the civil engineering function, five for the transportation function, and five for the supply function). Discussions were held, and best and final offers (BAFO) were received in October 1996 and evaluated. A second round of discussions was held and revised BAFOs were received in November. In mid-December, after evaluation of revised offers, the source selection authority determined that Madison's proposal was most advantageous for the civil engineering and transportation functions and that Eagle Aviation & Technology, Inc.'s proposal was most advantageous for the supply function.

The agency performed a cost comparison study, determining that it would cost less to perform base operating services in-house, and notified Madison of its decision on

¹Materials, parts, and supplies for maintenance of military family housing was to be provided by the contractor, which would then be reimbursed on the basis of cost plus a material handling fee.

March 21, 1997.² Madison was debriefed and, after reviewing the agency's cost comparison study and supporting data, Madison filed a base-level appeal, by letter of April 4, alleging that the cost comparison was flawed for a number of reasons.³ After making some upward adjustments to the agency's in-house cost estimate in response to Madison's appeal, the Air Force denied Madison's base-level appeal on May 6. By letter of May 12, Madison requested a major command (MAJCOM) review of the denial of its base-level appeal. After making some additional upward adjustments to the in-house cost estimate, by letter of July 17, the MAJCOM cost comparison administrative appeal review board upheld the original decision to retain the base operating services in-house⁴ and denied Madison's MAJCOM appeal.⁵ Madison filed this protest shortly thereafter.

The protester contends that the cost comparison study and appeal process were seriously flawed.⁶ Madison alleges that the base personnel who prepared the in-house cost estimate "gamed" the procurement by not including some costs in the initial in-house estimate so that they could review Madison's and other offerors' proposed costs before adding the costs during the appeal process. Madison also alleges that the base-level appeal process and review team were biased in favor of the base activity and in-house performance. Additionally, Madison asserts that the

²The initial cost comparison showed that it would cost approximately \$[deleted] million less to have agency personnel perform the work. We have rounded off cost figures in this decision.

³Eagle also filed a base-level appeal alleging a number of different flaws in the cost comparison. By letter of April 10, Madison incorporated by reference all of the issues raised by Eagle into Madison's appeal.

⁴The final cost comparison showed that it would cost approximately \$[deleted] million less to have agency personnel perform the work.

⁵Eagle's base-level appeal was also denied, and Eagle requested a MAJCOM review of the denial of its base-level appeal. Eagle's MAJCOM review also was denied.

⁶In its initial protest letter, Madison stated that it was incorporating by reference all of the issues that it previously had raised with the Air Force in its base and MAJCOM appeals (which, in turn, had incorporated all of the issues raised by Eagle in its base-level appeal); Madison stated that it would not actually address most of those issues. Because Madison provided no explanation of what it believes was wrong with the base and MAJCOM responses to its two agency-level appeals, the unsupported allegations that Madison protested solely through incorporation by reference do not provide adequate bases for protest. Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4), 21.5(f) (1997); Science Applications Int'l Corp., B-265607, Sept. 1, 1995, 95-2 CPD ¶ 99 at 2.

figures used in the cost comparison understate the cost of in-house performance in several respects and overstate Madison's proposed price.

OMB Circular No. A-76 describes the executive branch policy on the operation of commercial activities that are incidental to performance of government functions. It outlines procedures for determining whether commercial activities should be operated under contract by private companies or in-house using government facilities and personnel. Generally, such decisions are matters of executive branch policy that our Office declines to review. Crown Healthcare Laundry Servs., Inc., B-270827, B-270827.2, Apr. 30, 1996, 96-1 CPD ¶ 207 at 3. However, we will review A-76 decisions resulting from an agency's issuance of a competitive solicitation for the purpose of comparing the cost of private and governmental operation of the commercial activity to determine whether the comparison was faulty or misleading. Id. Here, we find that Madison's contentions that the agency's appeal process was biased and that the cost comparison was flawed are without merit.

The protester contends that base activity personnel "gamed" the procurement process by omitting material and supply costs from the original in-house cost estimate and then, after Madison's prices were revealed during the appeals process, inserting an unrealistically low figure for the agency's material and supply costs in order to ensure that the cost comparison would be decided in favor of retaining in-house performance. Madison states that the performance work specifications (PWS) for both the civil engineering and the transportation functions contained numerous references to the fact that the contractor shall furnish everything needed to perform the work, and states that its own proposal included more than \$[deleted] million for the cost of materials and supplies. In contrast, Madison points out that the original in-house cost estimate included a "\$0" figure for material and supply costs (line 2 of the cost comparison study). Madison asserts that the base personnel who calculated the original in-house estimate intentionally inserted \$0 for material and supply costs so that they could insert a figure that was significantly less than Madison's proposed price for materials and supplies during the agency's appeals process. The protester further asserts that the base-level appeal procedure was biased towards in-house performance and against an award to Madison because the base-level review team improperly discussed the omission of material and supply costs from the original in-house cost proposal with the base activity employees who had made the original cost estimate before making upward adjustments to the in-house cost estimate.

Agency officials are presumed to act in good faith. Therefore, an allegation that contracting officials were biased or acted in bad faith to prevent an offeror from being awarded a contract must be supported by convincing evidence that agency officials had a specific, malicious intent to harm the protester. ASI Universal Corp., Inc.--Recon., B-239680.2, Nov. 13, 1990, 90-2 CPD ¶ 389 at 3. The Air Force reports that the omission of material and supply costs from the original in-house cost estimate was nothing more than a mistake made by the base activity employee who

calculated that portion of the in-house cost estimate. After reviewing the entire record,⁷ we conclude, as discussed below, that the record does not support the allegation that base activity officials somehow gamed the procurement or that the base-level review procedures were biased against Madison.

It is clear from the record that base personnel were confused regarding whether material and supply costs were required in the in-house cost estimate. During the hearing conducted by our Office, the base activity's independent review officer (IRO) testified that, upon review of the initial draft of the cost comparison form and related documents, she was concerned because the in-house cost estimate included no material and supply costs. The record shows that when the IRO asked the base employee who had completed the cost comparison form why \$0 was inserted for the base's material and supply costs, the base employee responded that he understood from reading the RFP's PWSs that, for the most part, materials and supplies were to be government-furnished equipment (GFE) and that, since these items would be GFE whether the base activity or a private contractor performed the work, the costs were considered common costs that should not be included. The IRO also testified that she had difficulty determining from the various PWSs what, if any, material and supplies were required to be priced and what were GFE. At one point, the IRO stated in a memorandum for the record, "The wording for government furnished items and contractor furnished items was very confusing and seemed contradictory."⁸ The IRO's concern was alleviated in part when she discussed with the base employee the fact that the in-house cost estimate included some material and supply costs in line 3 ("Other Specifically Attributable Costs") and line 7 ("Additional Costs") of the cost comparison form. Based upon this

⁷We reviewed, among other things, the protester's and the Air Force's briefs, the RFP, the cost comparison study (including revisions and supporting documentation), and all documentation associated with the base and MAJCOM-level appeals. We also considered the testimony of witnesses (representing both parties) who testified during a hearing convened on October 3 in connection with this protest.

⁸After reviewing the RFP, we can understand the base personnel's confusion. The RFP is voluminous and requires close scrutiny in order to understand what materials and supplies are contractor-provided. For example, the RFP requires the contractor to provide materials and supplies for most of the work, but also includes a lengthy list of GFE; similarly, while the RFP indicates that the contractor will be paid on a fixed-price basis for most materials and supplies, it also indicates that the contractor will be paid on a cost-reimbursement basis for other materials and supplies. The RFP also states that the government will provide automated data processing equipment "to the minimum extent necessary for mission accomplishment," without listing the exact equipment that will be provided as GFE or defining the term "minimum extent necessary."

record, we think it is clear that the base employees simply made a mistake and misinterpreted the RFP's requirements, and that Madison's allegation of bad faith, based solely on the entry of \$0 for material and supply costs, is insufficient to establish bad faith.

Concerning the allegation that the base-level review was biased against Madison, the protester complains that the review team discussed some of the issues raised in Madison's base-level appeal (in particular, the lack of any material and supply costs in the in-house cost estimate) with base activity personnel before making any upward adjustments to the in-house cost estimate. Madison argues that the base activity should not have been permitted to correct the omission of material and supply costs once Madison filed its appeal and its costs were revealed. We find no evidence of bias during the agency's review process.

Since the procurement included an A-76 cost comparison study, the in-house cost estimate was delivered to the contracting officer and remained sealed until after the selection of the most advantageous contractor proposals was completed. Therefore, while the agency held two rounds of discussions with the private offerors and twice allowed them to revise their proposals in an effort to eliminate any deficiencies, no discussions were held with the in-house team that developed the "most efficient organization" and the in-house cost estimate. When Madison alleged mistakes or unreasonably low costs in the in-house estimate, the agency was empowered and obligated to review the cost estimate and to correct any errors found in the cost comparison as well as in the in-house cost estimate upon which it was based. See EPD Enters., Inc., 69 Comp. Gen. 46, 47-48 (1989), 89-2 CPD ¶ 393 at 3; OMB Circ. No. A-76--Revised Supplemental Handbook, Ch. 3, Sec. K.5. In our opinion, since discussions had not been held with base personnel concerning cost deficiencies, and because the base personnel, having originally calculated the in-house cost estimate as well as the most efficient organization upon which it was based, were the people who were most knowledgeable about the agency's support for its proposed costs, the review team logically and reasonably turned to the base activity personnel for justification of the cost estimates and for additional information that would allow the review team to make appropriate adjustments. There is no evidence that the review team's actions were motivated by bias and, in fact, the review team's actions were consistent with the agency's internal guidance on conducting cost comparisons. See Air Force Pamphlet 26-12, "Guidance For Implementing The Air Force Commercial Activities Program," §§ 6-3 and 14-3.g(2) (Sept. 25, 1992). We note that, after discussing some of Madison's allegations with base personnel, the base-level review team made upward adjustments of more than \$1.7 million to the in-house costs estimate--action by the review team that, in our opinion, was inconsistent with the protester's assertion of bias against it.

The protester contends that the cost comparison used unrealistically low estimates of the base activity's in-house costs for materials and supplies, labor for maintenance of military family housing, and quality control. Madison argues that

material and supply costs will amount to "over \$[deleted] million," the amount Madison alleges it included for this item in its proposal.

The IRO testified that, while the original in-house estimate contained \$0 for the material and supply costs on line 2 of the cost comparison, some material and supply costs were included in line 3 ("Other Specifically Attributable Costs") and line 7 ("Additional Costs") of the original cost comparison. The record shows that the base-level review team made some fairly large upward adjustments to the in-house estimate. Ms. Ginger Bright, an Air Force cost analyst, testified (and her testimony is confirmed by the written record) that, when Madison appealed the base-level appeal decision, the MAJCOM appeal board appointed a review team to conduct a line-by-line review of the PWS to identify all materials and supplies that would be needed to perform the work and a separate team of cost analysts to determine, using various pricing tools (e.g., commercial catalogues), the cost of each of the material and supply items. The MAJCOM board then made additional upward adjustments to the in-house cost estimate. Thus, after considering all appeals, the Air Force added to the material and supply costs that were included in the original cost estimate approximately \$550,000 for material and supplies on line 2 and approximately \$1.1 million for material and supplies on lines 3 and 7 (for items such as tool kits, portable radios, a base station, badge equipment, miscellaneous equipment for housekeeping, tools, landscape materials, ground fuels, and replacement items). In sum, the record shows that when all of the material and supply costs that were eventually included in lines 2, 3, and 7 are tallied, the final in-house cost estimate included a total of approximately \$1.8 million for materials and supplies.

While the protester asserts that a more accurate estimate of material and supply costs is the more than \$[deleted] million that it included in its proposal, the record, including the hearing testimony of Madison's president, shows that, in fact, Madison's proposal did not break out its material and supply costs and that Madison is referring to approximately \$[deleted] million in other direct costs (ODC) that were included in its proposal. As explained by Ms. Bright during her testimony, Madison's ODC figure was not made up exclusively of material and supply costs, but also included other significant cost elements, such as payroll insurance (approximately \$[deleted] over the contract period) and certain "not-to-exceed" items (approximately \$[deleted] over the contract period). Additionally, Madison's president recognized that the firm's dollar figure for each individual item of material and supply (even, it was conceded, each roll of toilet paper) included an undisclosed amount of profit. In view of the apparently overbroad definition of material and supply costs used by the protester, on the one hand, and the very detailed cost analysis performed by the Air Force during the appeals process, on the other, we find no basis to conclude that the agency's in-house cost estimate was unreasonable.

Concerning the labor costs for maintaining military family housing, the PWS required the contractor or the base activity to provide all personnel to perform maintenance on the base's military family housing, and the RFP included estimates of the amount of work that would be required during the performance period. In its base-level appeal, Madison stated no reason for questioning the in-house estimate, but asserted only that the base activity "failed to address the labor costs associated with the requirement." Contrary to Madison's assertion, the in-house proposal included 15 full-time employees (and the costs associated with them) to perform the maintenance work. Notwithstanding the fact that Madison did not articulate why it believed that the in-house proposal was somehow inadequate on maintenance staff, the base-level review team examined the in-house proposal and PWS and adjusted the number of maintenance personnel upward to 18 full-time positions, which both it and the MAJCOM review board deemed adequate to do the work. In its protest before our Office, Madison does not explain why it thinks that the base-level review team and the MAJCOM appeal board are wrong; instead, Madison simply asserts again that the base activity's estimate does not include enough personnel. Because Madison provided no evidence nor any detailed statement of facts to support this allegation, the unsupported allegation is not an adequate protest basis. Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4), 21.5(f) (1997); Science Applications Int'l Corp., supra.

Madison contends that the RFP's requirements were relaxed in favor of the base activity because the agency's technical performance plan did not designate an employee to work full-time as the chief of quality control and, therefore, Madison asserts that the in-house cost estimate for quality control was too low. The RFP required the contractor to include a quality control plan, described a number of tasks that the quality control organization would have to perform, and required that an on-site employee act as chief of quality control and be responsible for all quality control matters. Contrary to the protester's contention, the RFP does not require that an employee be designated to work full-time as the chief of quality control and therefore the RFP requirements under quality control were not relaxed. The agency's technical performance plan stated that the facility manager would perform on a part-time basis as the chief of quality control and would be the focal point for the agency's quality control program. The agency's technical performance plan also describes five supervisory positions, each in a different area of expertise (e.g., maintenance mechanic supervisor) and each of which the plan states will be delegated some of quality control functions. We have no basis to question the conclusion of the base-level appeal team and the MAJCOM review team that the quality control tasks can be performed adequately by the agency's team comprised of the facility manager and five other supervisors.

The protester also contends that the cost comparison overstated Madison's labor costs. Madison states that the labor rates in its BAFO were based upon a \$2.56 per-hour fringe benefit rate, which was the minimum rate specified in the Department of Labor (DOL) wage determination included in the RFP. Madison

states that, on December 30, 1996, the DOL published in the Federal Register a new rule, effective June 1, 1997, that would have allowed Madison to lower its hourly fringe benefit rate to \$1.16 per hour, since the contract would not be awarded before June 1. Madison contends that, because the DOL's new fringe benefit rule was published in the Federal Register before the agency completed the cost comparison, the new rule had the force and effect of law, and the Air Force should have reduced Madison's labor rates by \$1.40 per hour for a total reduction of approximately \$[deleted] million.

Madison does not state when it first became aware of the DOL's new minimum fringe benefits rule, but, as the rule was published in the Federal Register, Madison was on constructive notice of it as of December 30, 1996. Inter-Con Sec. Sys., Inc.; Washington Patrol Serv., Inc., B-192188, Feb. 9, 1979, 79-1 CPD ¶ 86 at 9; see Keci Corp.-Recon., B-255193.2, May 25, 1994, 94-1 CPD ¶ 323 at 4. The Air Force's March 20, 1997, notice to Madison that the cost comparison resulted in a determination to retain performance in-house specifically stated that the cost comparison was based on the prices Madison had proposed in its BAFO. Thus, Madison knew everything it needed to know concerning this issue on or about March 20. However, Madison did not raise the issue in its April 4 base-level appeal or even in its May 12 request for MAJCOM review. As Madison did not raise the issue in its appeal to the Air Force, Madison did not exhaust the agency's cost comparison appeals procedure and we will not consider the issue.⁹ Trans-Regional Mfg., Inc., B-245399, Nov. 25, 1991, 91-2 CPD ¶ 492 at 3; Dyneteria, Inc., B-222581.3, Jan. 8, 1987, 87-1 CPD ¶ 30 at 3. We note, however, that the new DOL rule merely sets forth a formula for determining the minimum fringe benefit rates that must be used in service contracts, and Madison was free to propose on the basis of higher than minimum fringe benefit rates. Because the Air Force could not simply reduce the labor rates that Madison had proposed in its BAFO, we think that it was incumbent upon Madison to tell the Air Force (at some time before, or even during, the base level-appeal) if it truly intended to lower its proposed labor rates because of the new rule. Madison did not.

Madison also contends that the RFP's historical overtime data were inaccurate and misleading. Madison asserts that in denying Eagle's base-level appeal (which alleged, among other things, that the in-house estimate of overtime costs was too low) the base-level review team revealed that it used historical data that were different from the historical overtime data set forth in the RFP. However, Madison received a copy of the base-level denial of its own and Eagle's appeals (the appeals were denied in a consolidated decision on May 6, 1997), but did not raise the issue

⁹By letter of May 16, 1997, Madison attempted to add this issue to its MAJCOM appeal. While the appeal board commented on the issue in dicta in its July 17 denial of the appeal, the board specifically stated that it was not ruling on the fringe benefits issue because Madison had not raised it in its base-level appeal.

in its MAJCOM appeal. Again, because Madison did not raise the issue in its appeal to the Air Force, Madison did not exhaust its administrative appeals and we will not consider the issue. Id. In any event, the RFP did not include any historical overtime estimates, and, in denying Eagle's appeal, the base-level appeal team discussed only the method used by one of its members to estimate--using financial data for several different Air Force work centers, including but not limited to Columbus Air Force Base--how much overtime could reasonably be expected to accrue at Columbus. Thus, the methodology discussed in the denial of Eagle's base-level appeal was used to check the accuracy of the in-house overtime cost estimate but was not used by the base activity to prepare the in-house estimate. According to the hearing testimony of the Chief of the Columbus Wing Manpower and Quality Office, the base activity's supervisors calculated the in-house overtime cost estimate using their own experience and the description of the work contained in the RFP's various PWSs.

In sum, the protester has provided no basis for our Office to conclude that either the agency's cost comparison or its appeals procedures were improper or otherwise flawed.

The protest is denied.

Comptroller General
of the United States